No. ~~2645.~~

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

MANEY BROTHERS & COMPANY, A CO-PARTNERSHIP CONSISTING OF J. W. MANEY, HERBERT G. WELLS, AND E. J. WELLS,

Appellants,

vs.

CRANE CREEK IRRIGATION LAND & POWER COMPANY, CRANE CREEK IRRIGATION DISTRICT, SUNNYSIDE IRRIGATION DISTRICT, PORTLAND WOOD PIPE COMPANY, SLICK BROTHERS CONSTRUCTION COMPANY, L'T'D, A CORPOPATION, S. C. COMERFORD, E. D. FORD, A. G. BUTTERFIELD, R. C. McKINNEY,

Appellees.

CRANE CREEK IRRIGATION DISTRICT AND SUNNYSIDE IRRIGATION DISTRICT,

Appellees and Cross-Complainants,

vs.

MANEY BROTHERS & COMPANY, A CO-PARTNERSHIP CONSISTING OF J. W. MANEY, JOHN MANEY, HERBERT G. WELLS, AND E. J. WELLS,

Cross Appellees.

Brief for Appellees and Cross-Appellants.

C. S. VARIAN,

Solicitor for Appellees and Cross-Appellants.

Residence, Salt Lake City, Utah.

E. R. COULTER,

Of Counsel.

Residence, Weiser, Idaho.

No. 2645.

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Cross Appellees.

Brief for Appellees and Cross-Appellants.

STATEMENT OF THE CASE.

The appeal and cross-appeals herein are taken from the decree of the District Court given in the case of the Portland Wood Pipe Company, a corporation, plaintiff, vs. Slick Brothers Construction Company, Ltd., a cor-

poration, et als., defendants, and are to be argued and considered at the same time with the appeals taken by Crane Creek Irrigation District and Sunnyside Irrigation District, appellees and cross-appellants here, from that portion of the said decree charging a mechanic's lien against the property of the said district.

Maney Brothers & Company filed a cross-bill in the original suit setting up a mortgage given by the Crane Creek Irrigation Land & Power Company, an original defendant in the suit (hereinafter called "Company") on September 29th, A. D. 1911, to the said Maney Brothers Company, and upon certain lands described in the mortgage (which was annexed to the bill as Exhibit "A," Transcript 29) on the reservoir and site, dam, canals, ditches, head gates, flumes, pipe lines, laterals, and other structures, dams and works used or intended to be used or required in connection with the distribution of the water from the reservoir, and for carrying and distributing the water to the place or places of intended use now owned or constructed or *which may hereafter be acquired or constructed by the mortgagor* with the rights-of-way therefor; all water rights and rights to the use of water in connection with the reservoir and irrigation works "now owned or that may hereafter be acquired," by the mortgagor, and also upon certain permits issued by the State Engineer of Idaho and described by number and record.

The habendum clause included all the "described real, personal and mixed property, and the rights, franchises, contracts, mortgages, notes, bonds, water rights and permits, rights-of-way, reservoirs, dams, canals, flumes, pipe lines, ditches, and other structures forming a part of said irrigation system now owned by the mortgagor or hereafter constructed or acquired by the mort-

gagor, with all the eastments, rights-of-way, privileges and appurtenances thereunto belonging or in any wise appertaining.''

The mortgage was given to secure the payment of a promissory note, of even date therewith, whereby the Company promised to pay Maney Brothers & Company on November 15th, 1912, $87,000, with interest at 6% per annum from November 15th, 1911. (Transcript 29, 30, 31, 34, 35.)

It was alleged that after the execution of said note, but before its delivery to cross-complainant, the individual defendants, E. D. Ford, A. G. Butterfield, and R. C. McKinney, for value received, endorsed the same in writing, waiving presentation, demand, protest and notice of non-payment. (Transcript 25.)

The mortgage contained provisions authorizing the mortgagor to carry out its contract of August 22nd, 1910, with the irrigation districts, but stipulating that the mortgagee should not be required to release the lien of the mortgage on any of the property described or to be conveyed under the aforesaid contract until there should be deposited as additional security with a certain bank cashier, as trustee, $75,000 in the case of one district and $50,000 in the case of the other district, par value of legally issued bonds of the districts, they having first been approved by the Supreme Court of Idaho; but upon such bonds being delivered, the mortgagee agreed to release from the lien of the mortgage, the interest to be conveyed to the mortgagor to the districts. (Transcript 37, 38.)

The mortgage further provided that the mortgagor might sell bonds deposited with the trustee of the two districts, or any part thereof, at not less than 75% of

their par value, applying the money received therefor upon the indebtedness secured by the mortgage.

The mortgage further provided that "the contracts which the mortgagor has with the irrigation districts herein mentioned and all extensions thereof and amendments thereto that may hereafter be made, are hereby assigned to the mortgagees hereunto as the security for the indebtedness secured hereby." (Transcript 42.)

The Company answered the cross-bill substantially admitting the allegations thereof, and the irrigation districts answered severally admitting the execution of the mortgage and note, the amount due thereon, and alleged the organization of the districts pursuant to law, and that on the 29th day of September, A. D. 1911, Maney Brothers & Company entered into a contract with the Company, the original contractor in the construction of the system, to furnish materials and perform labor for the Company in consideration of approximately the sum of money mentioned in the note and mortgage; and that before any materials had been furnished or work performed, the said Maney Brothers & Co. procured from the Company the said note and mortgage; that the Company was not authorized in law to charge the property of the districts with the mortgage lien for the payment of the costs of construction, and that the mortgagee had no authority to so contract with the Company, (the answers of each district are the same. Transcript 66, 70, 82, 85, 86.) Witness, E. D. Ford, testified that the first construction work done on the project after the contracts with the districts were made, was in October, 1911, and that was done by Maney Brothers and consisted of building the dam or reservoir site; that no work has been done on the dam in the way of construction since, and that the

mortgage to Maney Brothers was given in connection with that work; that he advised the districts of the giving of the mortgage about the time it was given; that he prevailed upon the districts to execute Maney Brothers Exhibit No. 6, in order to get certain concessions from them. (Transcript 165, 166.)

Exhibit No. 6 purports to be a resolution by the directors of the Crane Creek Irrigation District adopted June 15th, 1914, relating to the mortgage, and probably intended to ratify the act of the President in executing and delivering a resolution stating that the districts had no defense against the mortgage, "and the conveyances that have been made to said reservoir, and the conveyances that may be made by the Crane Creek Irrigation Land & Power Company to them of the interest in said reservoir, and all conveyances which may be made prior to the satisfaction of the said mortgage, will be subject to the lien of the said mortgage." (Transcript 157, 158.)

A similar resolution was adopted by both districts in joint meeting on July 10th, 1914, and still another appears in the record also as of date June 15th, 1914. Maney Brothers Exhibit 4-Exhibit 5. (Transcript 151, 154, 157.)

On the day of the execution of the note and mortgage the Company and the mortgagee entered into a contract in writing for the construction of the dam at the reservoir site known as the Crane Creek dam. This contract provided that simultaneously with its execution, the Company should execute the note with the endorsements of the individual defendants hereinbefore mentioned and would mortgage upon all its property rights and franchises as security for the payment of the said note and any and all other sums due or to become due;

and that the note should be deposited with a trustee to be delivered to the mortgagee upon a certificate by the engineer of the Company that the work had been completed in accordance with the terms of the agreement. (Transcript 90, 95, 96.)

The orginal contract between the irrigation districts and the Company of August 22nd, A. D. 1910, was in evidence and marked "Sunnyside and Crane Creek Irrigation Districts' Exhibit 'B' ". By this contract, (paragraph 2) the Company agreed to sell and convey, and each district agreed to purchase certain percentages of interest in and to certain permits, water rights, rights-of-way, canals, flumes and laterals, and in all canals, pipe lines, flumes and aqueducts situate wholly without the boundaries of the district; and also the main canals, distributing laterals, pipe lines and flumes situate wholly within the boundaries of the district. (Transcript 104, 105.)

The Company also agreed to convey to the districts certain percentages of interest in and to the water rights and reservoir site, excepting right of possession thereof, which was to be held until final conveyance; "and upon the completion of any portion of the said irrigation system, as shown by each monthly estimate in the construction thereof, the Company agrees to convey to the districts such completed portion with the same proportions of the rights-of-way for such system; and upon the completion of the whole of such system within the time above specified, to convey the whole of the undivided interest in and to said water rights, appropriations, reservoir sites, rights-of-way, canals, dams, pipe lines, flumes, laterals and other structures, with the appurtenances contemplated in this agreement, and agreed to be sold and

conveyed hereunder, together with the possession thereof to the district."

In consideration of the delivery by the district to the Company, coupon bonds of the face value of $100,000 and of deliveries by the district to the Company upon receipt of the conveyance above erferred to, coupon bonds at face value to an amount equal to such part of the entire bond issue of the district to be sold and delivered under the contract as the constructed portion of the works of the Company bore to the entire work to be constructed for the use and benefit of the district, the Company agrees to make the aforesaid conveyances. (Paragraph 7, Transcript 107.)

In consideration of the agreements by the Company, and in full payment of the said system to be sold and conveyed when completed as in the contract provided, the district agreed to deliver to the Company its coupon bonds at their face value to the amount of $415,000. (Paragraph 8.) It was further provided that all conveyances should be by sufficient deed, and that all properties conveyed should be free and clear of all incumbrances. (Paragraph 11, Transcript 107, 108, 110.)

The Company agreed to furnish the district 24,900 acre feet of water each season, to be stored in the reservoir and to be used as desired by the district during the irrigation season as part of the consideration of the contract, with the proviso, however, that in the event of a shortage of water and the water stored should not equal the maximum amount therein under ordinary conditions in ordinary years, that the districts should pro rate with the other tenants in common of the reservoir. (Paragraph 15.)

It was further agreed that the exclusive right to the perpetual use of all water stored in the said reservoir site at any point or points between the dam and the head gate of the main canal, was reserved to the Company, its successors and assigns forever, provided, however, that such use should not in any way interfere with the use of the said water by the District when needed for irrigation purposes (paragraph 18); and that the use of the water furnished to the Districts under the contract should be limited to the certain specified tracts included within the boundaries of the Districts as the same existed at the time of the bond issue, and against which are assessed the benefits of the system. (Paragraph 19. Transcript, 113-114.)

It was also agreed that the Company reserved, and should have the sole right to contract for and sell in the future, any and all water which may be needed by any lands within or without said Irrigation District as the boundaries thereof now exist, or as they may be hereafter extended, against which no benefits or merely nominal benefits are assessed, and to have the use of any canals or laterals owned by the District to transport the same under the direction of the District to the persons to whom it may sell water (paragraph 20); provision was made for the giving of bonds to each District in the sum of $100,000 by the Company, conditioned for the faithful performance of the contract and the construction of the work. (Paragraph 27, Transcript 114-119.)

The resolution of July 10, 1914, (Exhibit No. 4) contained the following statement, to-wit:

> "But, Be It Further Resolved, That, in passing this resolution, the said Districts do not waive any rights which they may have in the premises, and

> in the event that their interpretation of the law of the case is incorrect it shall not be the intention of said Districts to waive or relinquish any right which they may or might have in the premises.'' (Trans. 153.)

Ford testified, as shown in the record of the case, No. 2645, on appeal by the Districts against the Portland Wood Pipe Company, that the Company, at the time of the execution of the original contract of August 22, 1910, was the owner of a partially completed irrigation system; that the Company had actually completed nothing, but had acquired a right of way as a resevoir site and certain rights to waters and water appropriation. (Trans. 80.)

The Decree of the court below allowed a mechanic's lien against the System, but refused to charge the alleged mortgage lien against an interest in the property of the Irrigation Districts, but charged it against the interests of the Company in the System and the lands covered by the mortgage. It gave judgment against the Company and the individual defendants Ford, Butterfield, and McKinney, for the amount due on the note, and directed a sale of ''all the property hereinbefore described and upon which the mortgage of said cross-complainant has herein been adjudged and decreed a lien''; and directed that the contracts between the Company and the Irrigation Districts of August 22, 1910, in so far as the same had not been modified or changed by supplementary contracts between the parties ''shall be binding upon the purchaser or purchasers, their grantees, successors or assigns, under any sale or sales had in satisfaction of the lien or claim of said Maney Brothers & Company, and that the purchasers under the sale should take only such interest in the system as the Company had or was entitled to hold and retain under its existing contracts which the Dis-

tricts entered into prior to the filing of the cross-bill of said Maney Brothers & Company." (Trans. 207-208.)

The Districts severally appeal from so much of the Decree as charges the mortgage lien "upon all the right, title and interest of said defendant, Crane Creek Irrigation Land & Power Company, in the lands and premises, reservoirs, canals, irrigation works, structures, water rights, comprising and being a part of the irrigation system of this cross-defendant ———————— Irrigation District"; and from so much thereof as charges any part of the irrigation system of * * *with the lien of said mortgage, and adjudges a sale of said system." (Trans. 229-233.)

ASSIGNMENT OF ERRORS.

Comes now the cross-defendant, Crane Creek Irrigation District, and makes and files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 12th day of June, A. D. 1915, in said cause:

I.

The U. S. District Court for the District of Idaho, Southern Division, erred in adjudging by its said final decree herein, that the mortgage of cross-complainant, Maney Brothers & Co., was a charge and lien upon the lands and premises, reservoir, canals, irrigation works, structures and water rights comprising the irrigation system constructed by the Crane Creek Irrigation Land & Power Company, defendant herein, under a contract with this cross-defendant, and cross-defendant Sunnyside Irrigation District, and which had been theretofore, and

was at the time the said alleged mortgage was given, dedicated to public uses.

II.

The said Court erred in adjudging that the mortgage executed by the Crane Creek Irrigation Land & Power Company, a corporation, to the cross-complainant, Maney Brothers & Co., a co-partnership, on the 29th day of September, A. D. 1911, was a first charge and lien upon all the right, title and interest of the said defendant, Crane Creek Irrigation Land & Power Company, in the lands and premises, reservoir, canals, irrigation works, structures and water rights of the irrigation system constructed as hereinbefore stated, by the said Crane Creek Irrigation Land & Power Company, for this cross-defendant Crane Creek Irrigation District, and cross-defendant, Sunnyside Irrigation District, and dedicated to public uses.

III.

The said Court erred in adjudging that the said mortgage was a valid charge and first lien upon an undivided 30.4% of the said hereinabove mentioned irrigation system, superior to the right, title and interests of this cross-defendant, and of cross-defendant, Sunnyside Irrigation District.

IV.

The said Court erred in not adjudging and decreeing that the said mortgage executed by the Crane Creek Irrigation Land & Power Company on the 29th day of September, A. D. 1911, and delivered to the said cross-complainant, Maney Brothers & Co., a co-partnership, as

security for the indebtedness accrued and to accrue to the said co-partnership from the said Crane Creek Irrigation Land & Power Company, through and because of the construction of said irrigation system, was invalid, in that the said Crane Creek Land & Power Company had no authority or power vested in it to execute a mortgage upon said property, or any part thereof, and because in all the premises the said cross-complainant, Maney Brothers & Co., had actual knowledge and notice that the property hereinbefore and in said decree mentioned, had been and was dedicated to public uses, and there was no authority vested in the Crane Creek Irrigation Land & Power Company to charge the same with a valid mortgage lien.

V.

The said Court erred in adjudging that the alleged interest of the Crane Creek Irrigation Land & Power Company in the irrigation system of this cross-defendant, and of the cross-defendant, Sunnyside Irrigation District, should be sold at public sale; and the said court erred in adjudging that any part of the said system should be sold at public sale to satisfy the claim of the cross-complainant, Maney Brothers & Co., because under the law and the statutes of Idaho, the said property, and the whole thereof, was and is exempt from execution or foreclosure sale and the said court had no authority in the premises.

Wherefore, this cross-defendant prays that the judgment of the said District Court of the United States for the District of Idaho, Southern Division, be reversed, and that the said court be directed to enter its decree denying a foreclosure of the said mortgage against any of the

public property hereinbefore mentioned and described, with such other and further relief to which this cross-defendant may be entitled.

The Assignment of Errors is the same for each defendant and cross-appellant. (Transcript 220-223.)

ARGUMENT.

The situation made by these several appeals is a peculiar one, to say the least. The original bill, the cross-bill of Slick Brothers Construction Company, the cross-bill of Maney Brothers Company, assert, each for itself, a priority of right upon the property of the Districts and that the alleged liens of each of the others is subordinate. They also alleged that the whole of the property was necessary for the convenient use of the system and must be sold as one parcel, and the several prayers were to that effect. The same solicitors conducted the several proceedings, and it now appears that the interests of the mechanics' lien claimant and mortgagee are in conflict.

The contentions of counsel appear to be, that a contractor having the contract with an Irrigation District to construct, sell and convey part or the whole of an irrigation system for the use of Irrigation District, may, although the amount, character and times of payment for the work are definitely ascertained and fixed in his contract, charge the property as it comes into existence, with a lien of a mortgage given by the contractor to a third person.

In the instant case, the mortgage purported to cover not only all of the interest of the mortgagor, but all interests that it might thereafter acquire, and it even attempted to assign to the mortgagee the contracts the

mortgagor had made with the Districts to construct and convey the system, or certain percentages of interest therein.

Our contention is, as set forth in the brief for the appellant Districts in case No. 2645 on appeal from the decree charging a mechanics' lien against the property, that such a lien does not attach to property of this class under the laws of the State of Idaho, and in that brief we have set out such portions of said laws as we deemed necessary to arrive at a proper understanding of them, and we refer to those statutes as they appear in that brief. If we are upon certain ground as to mechanics' liens, it would seem that the same reasoning applies in the case of a mortgage lien. If the reason moving the law-making power to exempt property of this class from mechanics' liens is sound, it applies to and should be equally as effective in denying the right to mortgage property of this class. No one will contend that in the absence of a statute expressly permitting it to be done, the directors of Irrigation Districts could mortgage any part of the irrigation system in order to pay the claims of the contractor who has furnished material or performed labor in the premises. But, strange to say, it is contended here that a contractor may, at the time of the execution of his contract with a sub-contractor to construct and convey an irrigation system, or a part thereof, charge property not yet in existence with a lien of a mortgage given to secure the sub-contractor. If this could be lawfully done, it would furnish an easy way of avoiding the law forbidding the charging of such property with mechanics' liens. We have here a striking illustration of the absurdity of recognizing the right to charge property of this kind or any part thereof with

mechanics' or mortgage liens. In case of the mechanics' lien the court has charged the entire system with the payment of that lien, but the mortgage lien is only charged against a supposed reserved interest of the mortgagor in the property. In both instances, however, the property is to be sold as a whole and the purchasers, by the judgment of the court, are to hold it subject to certain provisions of the contract made with the Districts. But since the right to own property necessarily includes the right to manage it, if this decree shall stand, we have a divided administration. The Board of Directors, as public officers appointed and entrusted by law with the administration of the affairs of the Districts, are to admit strangers to the trust as tenants in common with them, of the irrigation system. It must be remembered that this property can only be administered as a whole and if there shall be a separation of its component parts and interests, the object and purpose of its creation will be fatally impaired.

In the brief of counsel it is stated that "No question has been raised as to the validity of the Maney Brothers mortgage. It is conceded that it was properly authorized and executed by the mortgagor, and that it was recorded in the proper county immediately after its execution," and that the Districts had actual as well as constructive knowledge of the existence of the mortgage from the time it was executed. In view of the fact that we claimed in the court below, in a printed brief filed, that "this mortgage transaction was fraudulent on the part of the Company and the mortgagee," and always insisted that the mortgage was invalid as to any part of the irrigation system, this statement is surprising. Suppose the Districts, through their officers,

had knowledge of the making, of the execution and recording of the mortgage, how does that affect the question here? What were they called upon to do with reference to the mortgage? They could do nothing in the premises but await an attempted assertion of the lien through foreclosure proceedings and then defend against it. The mortgagee had notice and knowledge of the boundaries of the Districts and their organization under the law. It also had notice of the contract made with the Districts by the mortgagee, and which was to govern it in the construction work. Argument is made at great length, with citation of a number of authorities, to prove the general principle that a mortgage lien cannot, where it has *vested* before initiation of other liens, be displaced by such liens. As to the abstract principle we make no challenge, but it is not applicable here and the entire argument is predicated upon the assumption that the lien of the mortgage was valid and attached to the property as it came into existence. Cases are cited to the effect that where a mortgage lien had *vested* it can not be displaced by subsequent liens. This is foreign to the question made by the Districts which is as hereinbefore stated.

On the other branch of the case in the matter of the lien of the Portland Wood Pipe Company, one of the solicitors now representing the mortgagee upon this appeal, verified the notice of the lien, and as heretofore shown, the original bill to foreclose the lien claimed its priority over several other liens against the property, including that of the mortgagee. On this appeal, his position appears to be reversed, since the claim is now made that the mortgage lien has priority. It is said in counsel's brief that the amount to be paid material

men and other contractors was fixed without consultation with or consent of the mortgagee; that the price for which the bonds were to be sold was likewise fixed without the mortgagee's knowledge or consent. Why should the mortgagee be consulted as to any of these matters? What concern had it with the contracts made or bonds issued by the Districts? The mortgagee entered into this business with open eyes, and is charged with knowledge of the law governing the construction, operation and maintenance of property of this class.

A critical examination of the mortgage, and the contract for construction of even date therewith, discloses a careful and painstaking attempt to obtain full security for the payment of the contract price of the work, at the expense of the Districts and all creditors. The mortgage is made to cover not only all the property of the mortgagor then in existence, but all that it might thereafter acquire, and included practically the entire irrigation system, together with a vast acreage of lands which the mortgagor Company held in fee, or had equitable title to. In addition to this it obtained the personal obligations of Ford, Butterfield and McKinney as endorsers upon the note. Perhaps it was then advised that a mechanics' lien could not be charged against the property necessary to the operation and maintenance of the irrigation system of the Districts, and supposed that the mortgage would be a valid and satisfactory security. Later, disturbing doubts as to the validity of the mortgage seemed to have arisen, and three or four years after its execution the mortgagee procured certain resolutions from the Districts purporting to admit the validity of the mortgage lien. Not content with one resolution, they procured three—two on the 15th of June, 1914, and one a

month later on July 10th. In adopting this last resolution the Directors seem to have awakened to a sense of their responsibility and recite in the resolution that they understood, under a correct construction of the law, that the lands and water rights which have been conveyed to the Districts are subject to the mortgage lien, but they do not waive their rights in the event that their interpretation of the law is incorrect. We do not see that these resolutions have any force or efficacy. There was no consideration for them, and if there were a consideration we would still be confronted with the question of the power of the Districts to validate the mortgage lien. If the mortgage lien was valid in its inception and attached to the property as it came into existence, there was no necessity for admissions of its validity. If they were not valid, the declarations of the Directors that it was could not give it life. The court below very properly refused to give effect to these resolutions as admissions by the Districts.

The mortgagee, by this mortgage, attempted to secure a larger security than they would have had through a mechanics' lien, if such a lien could be charged against the property. It was only concerned in the construction work with the building of the dam. That, and that alone, was within its contract; the remainder of the construction work was to be and was performed by other contractors. The Districts have issued bonds as the law provided, pursuant to the contract, amounting, at par value thereof, to the sum of $798,123.00, and these bonds were sold in the open market and are held by persons in different parts of the country. The Districts have paid the Company the full amount of the contract price.

A MORTGAGE LIEN CANNOT BE RAISED NOR CHARGED AGAINST AN IRRIGATION SYSTEM INTENDED FOR THE PURPOSES AND USES WHICH IRRIGATION DISTRICTS ARE ORGANIZED TO ADMINISTER BECAUSE SUCH PROPERTY IS DEDICATED TO PUBLIC USES FROM THE BEGINNING OF ITS CONSTRUCTION.

The contract made by the Districts with the Company was executory, and was not only a contract of sale but of construction. The doctrine of relation applies to such a contract and the equitable title to the property to be constructed and conveyed was vested in the Districts as of the date of the contract, and the legal title vested as the conveyances were made.

It appears from the evidence that the mortgagee was the first contractor employed by the Company on the work, and performed the first construction work in completing the dam necessary for the efficiency of the reservoir. The contract of construction with the mortgagee, and the execution and delivery of the note and mortgage, were contemporaneous, and, in fact, both instruments (executed on September 29, 1911), together constitute the contract with the mortgagee. The mortgage upon its face purports to charge all the property, real, personal or mixed, which the Company then had or might thereafter acquire, and particularly describes the reservoir and the lands situated within the site, right-of-way from the Government of the United States, all canals, ditches, head-gates, flumes, pipe lines, laterals and other structures, dams and works used or intended to be used or acquired in connection with the distribution of the water from said reservoir, and for carrying and distributing the

water to the place or places of intended use, now owned or constructed, or which may hereafter be acquired or constructed by the Company, including permits issued by the State Engineer of Idaho, together with certain lands particularly described. The habendum clause includes all of the said property then owned by the Company and thereafter to be constructed or acquired by it. With the lands of the Company, excepting those underlying the site of the reservoir, we have no concern. As to them, so far as the Districts are concerned, the mortgage lien may stand, but we have concern with the lien asserted by the cross-complaint and claimed by counsel upon the whole and every part of the System for the diversion, conveying and distribution of the waters as provided by law to the owners and occupiers of lands within the boundaries of the Districts. What has been heretofore said upon the question of mechanics' liens applies with equal force to this question. The Company had no authority in law to cover with this mortgage the construction work, in whole, or in part, that it had contracted with the Districts to do and complete. It is evident that a mortgage lien upon such property would be just as effectual as a mechanics' lien in impairing if not destroying the effective usefulness of the System. The contract of the Districts with the Company did not empower it to charge the property dedicated to public uses with a mortgage lien to enable it the better to perform its contract. It could not lawfully have done so, because the district officers, as trustees, were restrained and limited by statute to the administration only, of the trusts declared by the law. They nevertheless had a

right to contract for the construction and to negotiate for the water system in advance of its total completion.

Stowell v. Rialto Irr. Dist., 155 Cal. 215, 100 Pac. 248-251.

But the Legislative intention clearly was and is, that payment must be made either with money or by the bonds of the Districts. It is familiar law that all persons dealing with municipal corporations (or other public officers) are charged with knowledge of the limitations upon the power of their officers.

"Since the authority of public officers can only be created by law, and is, therefore, a matter of public record, all persons dealing with them are bound to take notice of its existence and must ascertain that it is sufficient in assumed use. Their power and authority is special and limited, not general, and their right to act in a specific instance must be ascertained and determined by an inspection of the law interpreted strictly."

Abbott Municipal Corporations, Vol. 2, p. 1562;

Hughson v. Crane, 115 Cal. 404.

"A public corporation which has acquired property as a trustee for the public cannot act in such a manner as to deprive the public or its individual members of their personal or collective rights in the use of that property. The public corporation acts solely as a trustee; the community is regarded as a cestui qui trust and action inconsistent with or contrary to this relation will be regarded as illegal."

Abbott Mun. Corp., Vol. 3, Sec. 936, p. 2191.

If the Districts could not charge the System with a mortgage lien, surely the Company could not. Both the Company Mortgagor and the Mortgagee at the time of the execution of this mortgage must be held to have known that the System was to be constructed for the

uses of the Irrigation Districts, and that under the law the Company had no power to charge that property with the mortgage. Taking into consideration the circumstances accompanying the execution of the contract for construction, and the mortgage to secure payment therefor, one may assume that this scheme for security was devised for the purpose of getting something in an indirect way which the law forbade. If the mortgage lien is valid and can be foreclosed, as here attempted, against any part of the System, necessarily it follows that a sale may be had of the whole System for the purpose of satisfying the decree, since it cannot be divided.

In such case the consequences would be far reaching and irreparable. The purchaser would be vested with the title to the physical property, but since the franchises vested in the Districts to sell and distribute water could not be purchased and would not pass by the decree, he must find a market for the water without the boundaries of the Districts, and thus the scheme of a great and beneficial public utility is defeated. The Districts have no authority to pay the mortgage debt, nor to redeem from foreclosure sale, with either bonds or money, for their powers in the matter of construction and purchase have been exhausted.

But there is no authority given in the statutes relating to execution or foreclosure sales, to sell property of this class. The conception of the mortgagee as evidenced by the prayer of its cross-bill, and stated in the brief of counsel, is, that it must be sold as an entirety or whole, and without redemption, and, following the usual procedure, that the the purchaser be let into immediate possession of the irrigation works, rights and franchises sold. It may be true, that, if sold at all, it must be sold

as an entirety, because the component parts thereof cannot be separated and subjected to the lien or the decree. Consequently, a lien cannot attach to the reservoir site, canal, or rights-of-way, claimed or owned by the Company at the time of making its contract with the Districts.

> "It is the policy of the law to keep intact the property belonging to and essential to the operation of a public corporation, and hence its creditors will not be permitted to divide such property and sell a part of it."
>
> Guest v. Merion Water Co., 142 Pa. St. 610, 21 Atl. 1001.

The rule has been applied in cases of railroads (where the statute did not expressly authorize the attaching of liens to specific parts of the system), and manifestly the irrigation system of the Districts cannot be segregated for the purposes of the sale.

The general rule is that property of this character is not subject to execution sale.

> "The property of public corporations acquired by them for public purposes and in their capacity as governmental agents is held in trust for the public for the uses and purposes for which acquired. This trust property cannot be reached by process and sold to satisfy their debts no more than can other trust property be sold to satisfy the individual debts of any other trustee. A judgment, therefore, in the absence of express statutory provisions against a public corporation, cannot be enforced by execution, neither is it a lien upon any of its property."
>
> Abbott Mun. Corps., Vol. 3, p. 2575.

It is true that the lien of mortgage is by the decree only charged upon the unconveyed interest of the Company in the system, but a lien of the Portland Wood Pipe Company is charged upon the entire interest of the Dis-

tricts as a first lien, and as a second lien upon the interest of the Company, and a sale is directed of the entire system.

All of the proceedings in connection with this mortgage seem to indicate a scheme from the beginning to in some way charge or encumber the Districts with a debt for which they were not liable. They had no dealings with the mortgagee and their contracts began and ended with the contracts with the Company, of which the mortgagee had notice. They agreed to pay for the construction and conveyance of the System in bonds at the par value of $515,000.00. They have performed that part of the contract. There was no part of the System in existence at the time the mortgage was made, except as hereinbefore stated, a reservoir site for which an immense dam had to be constructed in order to make it available, and the ditch known as the Sunnyside Canal, together with certain permits and rights-of-way. This property confessedly was in the ownership or possession of the Company at the time the contract with the mortgagee was executed, and the mortgage given, and by that contract was dedicated to public uses. No consideration passed to the Districts for the mortgage. As to them, the Company was an original contractor as well as a vendor, and, as before stated, the price of construction and purchase has been fully paid. By that contract each of the districts acquired a "real" right, a right of property in the entire System which, at first, lacking a legal title, and therefore equitable only, is none the less the real beneficial ownership. Such property in the case of private persons descends to heirs, or passes by will, and is liable to dower.

Pom. Eq., 1st Ed., Sec. 106, pp. 87-88.

The Company contracted to construct and convey this property, which, from the initial step in the construction, became impressed with a public trust. In so far as the reserved interests of the Company were connected with the irrigation system of the Districts, they were, by the Company dedicated to public uses, and cannot be charged with liens nor subjected to public sale.

THE DOCTRINE OF RELATION IS APPLICABLE HERE, AND THE EQUITABLE TITLE TO THE PROPERTY TO BE CONSTRUCTED VESTED IN THE DISTRICTS UPON THE MAKING OF THE EXECUTORY CONTRACT OF SALE AND CONSTRUCTION.

By the contract made between the appellants and the Company, the equitable title to the property *in esse* and the title to the property as it was constructed and came into being, vested in appellants. Applying the doctrine of relation, the Company was but a trustee for the appellants, and the appellants were trustees for the Company of the purchase price—either money or bonds. The doctrine of relation is based upon the maxim—

> "Equity looks upon things agreed to be done as actually performed."

It is a legal fiction, "by which in the interest of justice a legal title is held to relate back to the *initiatory step* for the acquisition of the land." (The italics are ours.) (U. S. vs. Anderson, 194 U. S. 394-399; Peyton vs. Desmond, C. C. A. 129 Fed. 1-11; Gibson vs. Chouteau, 13 Wall. 92-100; Krakow vs. Wille, 125 Wis. 254, 103 N. W. 121.)

An executory contract for the sale of land vests

equitable ownership of the property in the purchaser, and in such cases the seller retains the legal title as security for the deferred installments of the purchase price.

> "The vendor is, in equity, immediately deemed a trustee for the vendee of the real estate; and the vendee is deemed a trustee for the vendor of the purchase money. Under such circumstances the vendee is treated as the owner of the land, and it is devisable and descendible as is real estate. On the other hand, the money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him as other personality, and is distributed in the same manner on his death."
>
> Story's Equity Jurisprudence, Vol. 2, Sec. 1212;
>
> 1st Sugden, Vend., C. 5, Sec. 1;
>
> Dunne vs. Yakich, 10 Okla. 388; 61 Pac. 926.

Necessarily the application of the doctrine of relation to such contract must give effect to the conveyance, or other act stipulated for in the contract, as of the time the contract was made, otherwise it would be of no force or efficacy as against other conveyances. As said by Mr. Justice Miller in delivering the judgment of the court in Gunton vs. Carroll:

> "In view of a court of equity, a contract for the sale of land is treated, says Justice Story, for most purposes, precisely as if it had been *specifically performed*. The vendee is treated as the owner of the money. The vendor is deemed, in equity, to stand seized of the land for the benefit of the purchaser, and the trust attaches to the land so as to bind the heir of the vendor." (101 U. S. 431.) (Italics ours.)
>
> "The doctrine is well settled that when the vendor, after entering into a contract of sale, conveys the land to a third person, who has knowledge or notice of the prior agreement, such grantee takes the land impressed with the trust in favor

> of the original vendee, and can be compelled at the suit of the vendee to specifically perform the agreement by conveying the land in the same manner and to the same extent as the vendee would have been liable to do had he not transferred the legal title."
>
> Ross vs. Parks, 93 Ala. 153, 11 L. R. A. 148.

"Where a contract is made to convey real property or interest thereof and afterwards a conveyance is executed and delivered pursuant to the contract, the deed 'relates back to the contract,' or in other words, the title is considered as having vested in the grantee not merely from the date of the actual conveyance, but from the time when the contract was made."

Am. & Eng. Enc. Laws, 2d Ed. 275;
Thompson v. Spencer, 50 Cal. 532.

In an early case in Pennsylvania where the owners of a farm had, without a conveyance, dedicated a part of it to charitable purposes, that is, for the erection of a school house, and afterwards conveyed the entire farm to a third person, who repudiated the trust, it was held that he had become a trustee, etc., the point ruled upon is stated in the syllabus as follows:

> "If land previously appropriated by the owner to a charitable purpose, without a conveyance, be subsequently, by mistake, conveyed to another, the grantee thereby becomes a trustee for those who were beneficially interested in the charity."
>
> School Directors vs. Dunkleberger, 6 Pa. (Barr.) 9.

The contract with the company provided for the conveyance to the districts from time to time, *of the property as it was brought into existence,* and finally for a conveyance of the whole. These conveyances were conditioned upon the payment of specific sums as represented

by bonds of the Districts. The bonds were not delivered and the conveyances were not made at the times specified, for the reason, as given by Coulter in his evidence, that there was difficulty in finding a market for the bonds, and they were not called for by the Company. The issue and delivery of the bonds by the District and the conveyances by the Company of interests in the System from time to time, according to the estimates of construction work done, were matters with which the parties to the contract alone were concerned.

The equitable title to this System vested in the Districts at and from the date of the contracts of sale and construction, and the legal title vested as the property was conveyed from time to time. The doctrine of relation necessarily must affirm the interest and right of the Districts as of the date of the contract, otherwise there would be no protection for purchasers under like circumstances. The principle is illustrated in a leading case in Washington involving rights under an option contract for the sale and purchase of land, with a time limit of two years, brought to quiet title by the purchaser. It appeared that the vendor before the expiration of the two years, but after the payment of the entire purchase price, executed and delivered to a third person, with notice, a quit claim deed of the land. Thereafter, and within the time limit, the vendor deeded the land to the purchaser in pursuance of the option contract. It was held that the prior contract gave an interest in the land which bound the grantee in the quit claim deed, even though the purchase money had not been paid at the time he acquired the deed, and that upon receiving the deed

within the life of the option contract, the title thus conveyed related back to the date of the option.

Crowley vs. Byrne, 71 Wash. 444; 129 Pac. 113, 115;

People's Street Railway Co. vs. Spencer, 156 Pa. 85; 27 Atl. 113.

(It will be noted that in option contracts time is of the essence of the contract, and acceptance or performance necessarily must be within the time prescribed.)

So in Kentucky it has been held that a conveyance to a vendee in possession under a verbal contract relates back to the time when the contract was made, and prevails over a conveyance to a third party made subsequent to the verbal contract.

Allison's Executrix vs. Russell, 9 Ken. Law Rep. 198;

Reid vs. Pryse, 7 Ky. Law Rep. 526.

So a bond to convey realty, though insufficient to pass legal title, gives to the holder an equitable right superior to a claim of title by a subsequent purchaser or creditor of the vendor with notice.

McGuire vs. Whitt, 80 S. W. 474; 25 Ky. Law Rep. 2275.

In the brief of counsel it is asserted that,

"The payment from the Irrigation Districts to Crane Creek Irrigation Company were made contrary to law and no rights can be claimed thereunder."

In this connection counsel claim to have made the discovery that the contracts made by and between the Company and the Districts were in violation of law and void, and therefore the doctrine of relation could not rest upon them. It is not perceived that this question concerns the mortgagee. No issue is made as to this in the pleadings

or in the evidence and the State and bond holders, who are directly interested with the Districts, are not parties to this litigation. If the contract made by the Company with the Districts was illegal and void the mortgagee is in no position to challenge it since the contract made by it on September 29, A. D. 1911, with the Company was made as a sub-contractor for the special purpose of performing the work contracted with the Districts to be performed by the Company. This last contract is referred to in the mortgage. (Trans. 37.)

If this contract was void and the Company had no rights under it, surely the mortgagee had no business to enter into a contract to aid the Company in carrying out the provisions of the illegal contract. The argument of counsel here seems to be inconsistent with the theory upon which they ask the court to adjudge the lien of the mortgage as binding upon the entire property. Such contention can only be maintained upon the theory that the contracts of October 22, A. D. 1910, between the Company and the Districts were valid and binding obligations. Parts of the Idaho Revised Codes are cited to sustain counsel's contention, but a subsequent statute authorizing the payment for construction works with bonds is not mentioned.

By Act approved March 12, A. D. 1913, an additional section is added to the code as section 2404 A, as follows, to-wit:

> "Sec. 2404 A. In lieu of the sale of bonds as provided in Section 2404, and the payment for construction work in cash, as provided in Section 2416 of this Title, bonds authorized by the vote of the District for the purpose of acquiring or constructing irrigation works may be issued and delivered by the Board of Directors directly to

> the contractor in payment for such construction work, and the term construction work as herein used, shall be deemed to include the erection and construction of pump houses and electrical and other pumps or appliances for raising water on to the lands, as well as dams, headgates, ditches, laterals and other irrigation works. There may be included in any contract for construction, maintenance, interest and power, charges for such period as the Directors and the contractor may agree, not to exceed three (3) years, and when so included, interest, electrical, or other power and maintenance charges for the term agreed upon may be paid in bonds of the District to the amount agreed upon."
>
> Session Laws 1913, p. 542.

This Act did not take effect until sixty days after its approval, and within that time 151,000 of these bonds were delivered to the Company, but the remainder of the bonds were delivered after the expiration of the sixty days, when the statute took effect. The mortgagee has not been injured in the matter of issuing and delivering of bonds of the Districts. It made no contract in relation to the bonds and their validity are not in issue here, and this court cannot pass upon the question upon this appeal.

It is further contended that, "*The Districts are estopped to deny the validity of the lien of appellants' mortgage on their interest in the system.*" To establish this contention it is claimed that the resolutions hereinbefore referred to were adopted by the Districts in the expectation that they would gain time and avoid an impending failure and thereby lull the mortgagee into a sense of security. Before an equitable estoppel can be recognized it must be clearly shown that the party asserting the estoppel relied upon the representations and acts of

the other party and because of such reliance suffered injury. It is not shown in the evidence that the mortgagee relied upon the statements in the resolutions and was induced to do something or refrain from doing something for its benefit, and thereby suffered a loss or injury. There is no direct evidence that the foreclosure was delayed by reason of the resolutions, and at most the fact only appears inferentially. We again call attention to the declaration made in the last resolution by the Directors of both Districts of July 10, 1914, expressly stating that the Districts did not waive any rights in the premises and that in the event of their interpretation of the law being incorrect, it was not their intention to waive or relinquish any right which they migth have in the premises. (Trans. 153.) Moreover, delay alone in bringing the foreclosure suit cannot be held to be an injury sufficient upon which to ground an equitable estoppel in this case, since if the mortgage lien is valid and enforceable against the property, a delay, protracted or otherwise, would not affect the security, and the interest upon the debt is a sufficient compensation.

Counsel argues the question of equitable estoppel here as if the Districts were individuals or private corporations, ignoring the distinctions made in the cases cited. It is the exception and not the rule to permit an estoppel to be enforced against municipal corporations in relation to public property, or where the corporations represent public rights and interests.

In the case of Boise City v. Wilkinson (16 Ida. 150, 120 Pac. 169), cited by counsel, the city brought an action in ejectment against an occupant of a portion of the street which had been deeded to the original occupant by the Mayor thirty-eight years before the action was

brought, and had been occupied during that period by persons who had placed permanent and valuable improvements upon it. The court, while admitting the general rule, said there were special and peculiar cases in which such a corporation will be estopped to assert a stale, legal and inequitable claim. As said by Judge Ailshie in a concurring opinion, the court had no intention of departing from the rule laid down in 14 Ida. 282, 94 Pac. 170, wherein it is said: "Neither the city officers, nor any other public officer, would have any power to defeat the right of the public in property thus dedicated to public uses."

In Portland v. Inman-Poulson Co. (Ore.), 133 Pac. 829, it appeared that the city, by its officers, had *induced* defendants to purchase certain property, which they did, and expended three-fourths of a million dollars in the erection of the largest saw mill in the world on the property. Whereas afterwards the city asserted a right to open streets through the property, *but there was no public necessity for the streets* the city purposed to open, and the court held it was estopped under the special circumstances of the case from proceeding.

In Hubbell v. City, 64 Kans. 645, 68 Pac. 52, the court said that "a city in the exercise of its quasi private or corporate powers is governed by the same rules and is liable to the same extent as private corporations." There, the city, by promises and misrepresentations of its officers, induced one holding its warrants to permit them to remain uncollected until the cause of action on the debt was barred, and it was held that the city was estopped to deny the validity of the warrants, etc. Clearly these cases lend no support to the claim of an equitable estoppel made here.

In conclusion, counsel asks this court to reverse the judgment of the district court in the matter of the allowances of attorneys' fees, and to substitute the judgment of this court for that of the court below. As to this, we submit that the district judge was not bound by the estimates of value of services of counsel given in the testimony of Judge Hawley. The matter is at large in the discretion of the trial judge who is not bound by the evidence of witnesses, but may and should determine the matter of counsel fees aided by his own knowledge of the case and the services performed, considering and giving effect to the evidence in the light of all the facts and conditions.

It is further insisted that the cross-appeals herein are frivolous, and that the cross-complainants should be penalized for consuming the time of court and counsel with matters relating to the cross-appeals, etc. In any event it is said that they should be required to pay at least a part of the expense of printing the record on appeal. It is said that the Districts do not have an appealable interest in that part of the decree charging the mortgage lien upon the interest of the Company. Since the decree charges an interest in the property which is dedicated to public uses with the lien and directs a sale of that interest which will deprive the Company of right and power to complete its contracts with the Districts, it is patent that the Districts have an appealable interest.

In conclusion, we submit, that the Company in making the mortgage perpetrated a fraud upon the Districts, in violation of its contracts; that the lien of the mortgage did not attach to any portion of the irrigation system, and, that the decree of the court below should be re-

versed with directions that a decree be entered denying a foreclosure of the mortgage given by the Crane Creek Irrigation Land & Power Company to appellants against any portion of the Irrigation Systems of appellants and cross-appellants, and finally dismissing the cross-bill of appellants as against appellees and cross-appellants.

Respectfully submitted,

C. S. VARIAN,
Solicitor for Appellees and Cross-Appellants.
Residence, Salt Lake City, Utah.

E. R. COULTER,
Of Counsel.
Residence, Weiser, Idaho.